

ENVIRONMENTAL  
PROTECTION AGENCY

APR 22 1999

MONTANA OFFICE

04/10/1999

**PRIVILEGED  
DELIBERATIVE PROCESS**  
IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS

UNITED STATES COURTS  
SOUTHERN DISTRICT OF TEXAS  
FILED

APR 15 1999 **GS**

Michael N. Milby, Clerk of Court

UNITED STATES OF AMERICA and  
the STATE OF TEXAS,

Plaintiffs,

v.

ENCYCLE/TEXAS, INC. &  
ASARCO, INC.,

Defendants.

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COMPLAINT

Civil Action No.:

**H - 9 9 - 1 1 3 6**

SDMS Document ID



1061658

COMPLAINT

The United States of America, by authority of the Attorney General of the United States, and through the undersigned attorneys, acting at the request of the United States Environmental Protection Agency ("EPA"), and the State of Texas (the "State"), by and through the Attorney General, on behalf of the Texas Natural Resource Conservation Commission ("TNRCC"), file this complaint and allege as follows:

NATURE OF THE CASE

1. This is a civil action by the United States against Encycle/Texas, Incorporated ("Encycle") for injunctive relief and civil penalties pursuant to Sections 3008(a), (g) and (h) of the Federal Solid Waste Disposal Act as amended by, inter alia, the Resource Conservation and Recovery Act of 1976, the Solid Waste Disposal Act Amendments of 1980 and the Hazardous and Solid Waste Amendments of 1984 ("RCRA"), 42 U.S.C. §§ 6928(a), (g) and (h), for violations of RCRA at Encycle's Corpus Christi, Texas facility ("the Facility"). The violations that are the subject of this complaint relate to Encycle's receipt, generation, management, treatment, storage and disposal of hazardous wastes at the Facility.

2. This is a civil action by the United States against ASARCO, Incorporated ("ASARCO")

for injunctive relief and civil penalties pursuant to Sections 3008(a), (g) and (h) of RCRA, 42 U.S.C. §§ 6928(a), (g) and (h), for violations at ASARCO's El Paso, Texas smelter facility ("the Texas Smelter") and at ASARCO's Amarillo, Texas copper refinery ("Texas Refinery"). The violations which are the subject of this complaint relate to ASARCO's receipt, management, treatment, storage and disposal of hazardous wastes at the Texas facilities.

3. This is also a civil action by the State of Texas against Encycle/Texas, Incorporated ("Encycle") for injunctive relief and civil penalties pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901, et seq., the Texas Solid Waste Disposal Act, Tex. Health & Safety Code Ann., Chapter 361, Tex. Water Code Ann. Chapter 7, the Tex. Admin. Code, Title 30, Chapter 335, and Encycle's Industrial and Hazardous Waste Permit for violations at Encycle's Corpus Christi, Texas Facility. The violations that are the subject of this complaint relate to Encycle's receipt, generation, management, treatment, storage and disposal of hazardous wastes at the Facility.

4. This is also a civil action brought by the United States pursuant to Sections 309(b) and (d) of the Clean Water Act ("the CWA"), 33 U.S.C. § 1319(b) and (d), to obtain assessment of civil penalties against ASARCO for discharges of pollutants into the navigable waters of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311, and the conditions and limitations of six National Pollutant Discharge Elimination System ("NPDES") permits issued to ASARCO by the State of Tennessee's Department of the Environment and Conservation ("TNDEC") under Section 402 of the CWA, 33 U.S.C. § 1342. The Complaint also seeks civil penalties against ASARCO for discharges of pollutants through unpermitted point sources into navigable waters of the United States in violation of Section 301 of the CWA, 33 U.S.C. § 1311.

The violations alleged in the Complaint occurred at ASARCO's six mines and mills in eastern Tennessee.

### JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1355 and Sections 3008(a) and (g) of RCRA, 42 U.S.C. §§ 6928(a) and (g). This Court has jurisdiction over the subject matter of the State's claim in this action pursuant to 28 U.S.C. §§ 1331 and 1367(a); Sections 3008(a) and 7002 of RCRA, 42 U.S.C. §§ 6928(a) and 6972, because the State of Texas has asserted claims pursuant to its authorized hazardous waste management program.

6. Venue is proper in this judicial district under 28 U.S.C. 1391(b) and (c), and 1395(a), and under Section 3008(a) of RCRA, 42 U.S.C. § 6928(a) and under Section 309(b) of the CWA, 33 U.S.C. § 1319(b). Defendants Encycle and ASARCO were and are, at all material times, doing business in this district. Many of the acts giving rise to the claims alleged herein occurred in this district.

7. Notice of commencement of the United State's action has been given to the State of Texas as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

8. Notice of commencement of the United States' action has been given to the State of Montana as required by Section 3008(a)(2) of RCRA, 42 U.S.C. § 6928(a)(2).

9. Notice of the commencement of the United States' action has been given to the Tennessee Department of the Environment and Conservation ("TNDEC") in accordance with Section 309(b) of the CWA, 33 U.S.C. § 1319(b).

## ENCYCLE

10. Encycle is a wholly owned subsidiary of ASARCO and is a corporation organized under the laws of the State of New Jersey, doing business in the State of Texas.

11. Encycle is a "person" within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), 40 C.F.R. § 260.10, Tex. Health & Safety Code Ann. § 361.003(23), and 30 Tex. Admin. Code § 335.1.

12. At all material times herein, Encycle was the owner and operator of the Facility, a hazardous waste facility located at 5500 Upriver Road on the Texas Gulf Coast, in the City of Corpus Christi, Texas.

13. At all relevant times, Encycle controlled the day to day business operations of the Facility.

## ASARCO-TEXAS

14. ASARCO is a corporation organized under the laws of the State of New Jersey, doing business in the State of Texas.

15. ASARCO is the parent company of Encycle, Incorporated, a holding company operating out of New York City, New York. Encycle Incorporated is the parent company of Encycle.

16. ASARCO is a "person" within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), 40 C.F.R. § 260.10 Tex. Health & Safety Code Ann. § 361.003(23), and 30 Tex. Admin. Code § 335.1.

17. Prior to 1980, ASARCO operated a zinc manufacturing facility at the current location of the Encycle/Texas, Inc. facility in Corpus Christi.

18. At all material times herein, ASARCO was the owner and operator of the Texas Smelter, a primary copper smelter and associated sulfuric acid manufacturing plant located in the City of El Paso, Texas.

19. At all material times herein, ASARCO was the owner and operator of the Texas Refinery, a copper refinery located in the City of Amarillo, Texas.

20. At all relevant times, ASARCO controlled the day to day business operations of the Texas Smelter and Texas Refinery .

#### ASARCO-MONTANA

21. ASARCO is a corporation organized under the laws of the State of New Jersey, doing business in the State of Montana.

22. ASARCO is a "person" within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), 40 C.F.R. § 260.10, Mont. Code Ann. § 75-10-403(12) and Mont. Admin. R. 17.54.201.

23. At all material times herein, ASARCO was the owner and operator of the Montana Smelter, a primary lead smelter and associated sulfuric acid manufacturing plant located just south of the City of East Helena, Montana.

24. At all relevant times, ASARCO controlled the day to day business operations of the Montana Smelter.

#### ASARCO-TENNESSEE MINES

25. ASARCO is a corporation organized under the laws of the State of New Jersey, doing business in the State of Tennessee.

26. ASARCO is a "person" within the meaning of Section 502(5) of the CWA, 33 U.S.C.

§ 1362(5), and the applicable federal regulations promulgated pursuant to the CWA.

27. At all times relevant hereto, ASARCO owned and operated the following six mines and mills in eastern Tennessee: Coy Mine, Young Mine, Young Mill, New Market Mine and Mill and Young Mine - Beaver Creek Shaft all located in Jefferson County, Tennessee; and Immel Mine located in Knox County, Tennessee.

#### STATUTORY AND REGULATORY FRAMEWORK

28. RCRA was enacted on October 21, 1976, and amended thereafter by, among other acts, the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). 42 U.S.C. §§ 6901 et. seq. The statute established a program for the management of hazardous wastes to be administered by the Administrator of EPA. 42 U.S.C. 6921 et. seq. The regulations promulgated by the Administrator are codified at 40 C.F.R. Parts 260 through 271.

29. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, the Administrator may authorize a state to administer the RCRA hazardous waste program in lieu of the federal program when he or she deems the state program to be substantially equivalent to the federal program. When a state obtains such authorization, state regulations apply in lieu of the federal RCRA regulations in that state.

30. The Administrator granted authorization to the State of Texas to administer its hazardous waste program in lieu of the federal program on xxDecember 24, 1980 or December 12, 1984xx , and has authorized revisions to that program since that date. Pursuant to such authorization, the State of Texas, Texas Natural Resource Conservation Commission, has administered the RCRA hazardous waste program in the State of Texas through the Texas Solid Waste Disposal Act and the rules and regulations promulgated thereunder.

31. Specifically, the federal hazardous waste program is managed in the State of Texas, pursuant to the Texas Solid Waste Disposal Act ("TSWDA" or "Act"), Tex. Health & Safety Code Ann. Chapter 361, and the rules and regulations promulgated thereunder.

32. The TSWDA prohibits the initiation or continuation of the generation, transportation, treatment, storage, and disposal of hazardous waste except in compliance with the Act, and prohibits any person from violating any rule, permit, or order promulgated by the TNRCC.

33. The Administrator granted authorization to the State of Montana to administer its hazardous waste program in lieu of the federal program on July 25, 1984, and has authorized revisions to that program since that date.

34. Pursuant to Sections 3008(a),(g) and (h), and 3006(g) of RCRA, 42 U.S.C. §§ 6928(a), (g) and (h), and 6926(g), the United States may enforce the federally approved Texas and Montana hazardous waste programs, as well as the federal regulations promulgated pursuant to HSWA, by filing a civil action in United States District Court for injunctive relief, including corrective action and civil penalties.

35. Section 3005 of RCRA, 42 U.S.C. § 6925, 30 Tex. Admin. Code § 335.2 and Mont. Code Ann. § 75-10-406 generally prohibit the operation of any hazardous waste treatment, storage or disposal facility ("TSD facility") except in accordance with a permit. Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), 30 Tex. Admin. Code § 335.2(c) and Mont. Code Ann. § 75-10-406 further provide that certain hazardous waste facilities may obtain "interim status" to continue operating until final action is taken by EPA, Texas or Montana with respect to the facility's permit application, so long as the facility satisfies certain conditions. Therefore, a person may not own or operate a TSD facility unless the person has obtained a permit for the facility or has interim status

for the facility.

36. The owner or operator of a facility with "interim status" must comply with 40 C.F.R. Part 265, or other applicable regulations or the equivalent State regulations codified in Texas at 30 Tex. Admin. Code Chapter 335, Subchapter E and codified in Montana at Mont. Admin. R. Title 17, Chapter 54, Subchapter 6.

37. Under 30 Tex. Admin. Code § 335.1, a "solid waste" is a "hazardous waste" if it is identified or listed as a hazardous waste by the Administrator, pursuant to RCRA.

38. Under Mont. Admin. R. 17.54.303, a "waste" within the meaning of Mont. Admin. R. 17.54.302 is a "hazardous waste" if it is either listed as a hazardous waste in Mont. Admin. R. 17.54.330-333 or if it exhibits one of the characteristics set forth in Mont. Admin. R. 17.54.320-324.

39. Section 1004(34) of RCRA, 42 U.S.C. § 6903(34) defines "treatment" as "any method, technique, or process ... designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, safer for transport, amenable for recovery, amenable for storage, or reduced in volume. Such term includes any activity or processing designed to change the physical form or chemical composition of hazardous waste so as to render it nonhazardous." 40 C.F.R. § 260.10 expands that definition to include processes designed to change the character of the waste so as to recover energy or material resources therefrom. 30 Tex. Admin. Code § 335.1 and Mont. Code Ann. § 7510-403(15) are substantially the same.

40. Section 3004(d) through (g) of RCRA, 42 U.S.C. 6924(d) through (g), generally prohibit certain hazardous wastes from being disposed of on land unless the Administrator



determines that the methods used for land disposal are protective of human health and the environment for as long as the waste remains hazardous. Pursuant to Section 3004(d) through (g) of RCRA, 42 U.S.C. §§ 6924(d) through (g), the Administrator has promulgated regulations prohibiting land disposal of certain hazardous wastes unless the wastes meet certain treatment standards set forth in the regulations. The regulations are referred to as "land disposal restrictions," and are codified at 40 C.F.R. Part 268, 30 Tex. Admin. Code § 335.431 and Mont. Admin. R. 17.54.150.

41. Pursuant to Section 3008(h) of RCRA, 42 U.S.C. 6928(h), whenever the Administrator of EPA determines that there has been a release of hazardous waste into the environment from a facility subject to interim status requirements, the Administrator may commence a civil action for appropriate relief, including an injunction requiring the defendant to take corrective action necessary to protect human health and the environment.

42. Pursuant to Section 3008(a) and (g) of RCRA, 42 U.S.C. §§ 6928(a) and (g), and Public Law 104-134, a person is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each violation of RCRA which occurred prior to January 30, 1997, and \$27,500 per day for each violation that occurred after January 30, 1997.

43. Pursuant to Tex. Health & Safety Code Ann. § 361.224<sup>1</sup> and Tex. Water Code Ann. § 7.105, on request of the Texas Natural Resource Conservation Commission or Executive Director

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<sup>1</sup>The general enforcement provisions applicable to the violations alleged herein were transferred to Chapter 7 of the Water Code effective September 1, 1997. Act of May 31, 1997, 75<sup>th</sup> Leg., R.S., ch. 7, 1997 Tex. Sess. Law Serv. 4094 (Vernon) (codified at Tex. Water Code Ann. § 7.00 *et seq.*). Violations occurring before September 1, 1997, are governed by provisions of Texas Health and Safety Code Ann. § 361.001 *et seq.* Act of May 31, 1997, 75<sup>th</sup> Leg., R.S., ch. 7, § 62, 1997 Tex. Sess. Law Serv. 4094 (Vernon)

of the TNRCC, the Attorney General of the State of Texas shall commence a civil action for appropriate relief, including an injunction requiring the defendant to take corrective action necessary to protect human health and the environment.

44. Pursuant to Tex. Health & Safety Code Ann. §§ 361.223 and 361.228, Encycle is subject to injunctive relief and to the imposition of civil penalties of not less than \$100 or more than \$25,000 for each act of violation and for each day of violation.

45. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person except in compliance with Section 301 of the CWA, and as authorized by and in compliance with certain other sections of the CWA, including Section 402, 33 U.S.C. § 1342.

46. Section 402(a) of the CWA, 33 U.S.C. § 1342(a), provides that the Administrator of EPA ("Administrator") may issue NPDES permits which authorize the discharge of any pollutant directly into navigable waters of the United States, but only in compliance with applicable requirements of Section 301 of the CWA, 33 U.S.C. § 1311, and such other conditions as the Administrator determines are necessary to carry out the provisions of the CWA.

47. Pursuant to Section 402(b) of the CWA, 33 U.S.C. § 1342(b), the State of Tennessee submitted its State NPDES permit program to U.S. EPA, which was authorized on December 28, 1977.

48. Effluent limitations, as defined in Section 502(11) of the CWA, 33 U.S.C. § 1362(11), are restrictions on the quantity, rate and concentration of chemical, physical, biological and other constituents of wastewater discharges. Effluent limitations are among the conditions prescribed in NPDES permits issued under Section 402(a) of the CWA, 33 U.S.C. § 1342(a).

49. Section 309(b) of the CWA, 33 U.S.C. § 1319(b), authorizes the Administrator to

commence a civil action for appropriate relief when any person is in violation of, inter alia, Section 301 of the CWA, 33 U.S.C. § 1311, or violates any permit condition or limitation implementing, inter alia, Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

50. Section 309(d) of the CWA, 33 U.S.C. § 1319(d), provides that any person who violates, inter alia, Section 301 of the CWA, 33 U.S.C. § 1311, or who violates any condition or limitation of a NPDES permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, shall be subject to a civil penalty not to exceed \$25,000 per day for each violation, and pursuant to the Public Law 104-134, violations occurring after January 30, 1997, are subject to penalties not to exceed \$27,500 per day for each violation.

### GENERAL ALLEGATIONS

#### A. ENCYCLE

51. Prior to November 1980, ASARCO owned and operated a zinc manufacturing facility at the present location of the Encycle Facility.

52. In approximately 1988, ASARCO transferred the property and equipment at the location to Encycle/Texas, Inc.

53. From at least September 27, 1988 to the present, Encycle has been an owner and operator, as defined at 40 C.F.R. § 260.10 and 30 Tex. Admin. Code § 335.1, of a facility where Encycle received, generated, stored, treated and disposed of hazardous waste as defined in 40 C.F.R. § 261.3 and 30 Tex. Admin. Code § 335.1.

54. Because Encycle is and has been an owner and operator of a facility at which Encycle received, generated, stored, treated and disposed of hazardous waste, Encycle is and was subject to the RCRA hazardous waste program and the Texas authorized hazardous waste program,

codified at 30 Tex. Admin. Code Chapter 335.

55. From at least 1988 to present, Encycle received hazardous waste from various generators, and stored and treated such waste in order to render them amenable for disposal and/or metal recovery by ASARCO at the Texas smelter and the Montana smelter ("together "the ASARCO smelters").

56. Much of the wastes received by Encycle was either listed or characteristically hazardous wastes. Some of the hazardous wastes received by Encycle contained no significant recoverable metals values. Encycle stored the wastes in various areas around the facility and many of these areas were not properly permitted or designed for storage of hazardous wastes.

57. Encycle used hydro-metallurgical processes to create sludges from liquid wastes received in units that were not properly RCRA permitted units. Encycle combined various waste streams to produce its output. The drying and combining of these wastes is treatment as defined by RCRA. 42 U.S.C. § 6903(34). Encycle stored the combined wastes in various areas around the facility and many of these areas were not properly permitted or designed for storage of hazardous wastes. These combined wastes ("Encycle Wastes") were shipped off-site to various facilities for reclamation, treatment and/or disposal, including the ASARCO smelters in violation of numerous RCRA requirements.

58. Encycle also violated on numerous occasions the terms and conditions of its RCRA storage permit issued by the State of Texas on September 27, 1988, Permit No. HW-50221 ("the Permit").

59. There has been a release of hazardous waste into the environment at the Encycle facility.

**B. ASARCO-TEXAS**

60. From at least May 1991 to the present, ASARCO has been an owner and operator, as defined at 40 C.F.R. § 260.10 and 30 Tex. Admin. Code § 335.1, of the Texas Smelter, a facility where ASARCO received, stored, treated and disposed of hazardous waste as defined in 40 C.F.R. § 261.3 and 30 Tex. Admin. Code § 335.1.

61. From at least 1975 to the present, ASARCO has been the owner and operator, as defined at 40 C.F.R. 260.10 and Tex. Admin. Code 335.1, of the Texas Refinery that generated and stored hazardous spent refractory brick.

62. Because ASARCO is and has been an owner and operator of facilities at which ASARCO received, stored, treated and disposed of hazardous waste, ASARCO is and was subject to the RCRA hazardous waste program and the Texas authorized hazardous waste program, codified at 30 Tex. Admin. Code Chapter 335.

63. From at least May 1991 to present, ASARCO has received, stored, treated and disposed of various Encycle Wastes at the Texas Smelter. At least some of the Encycle Wastes were and are hazardous waste under 30 Tex. Admin. Code § 335.1.

64. There has been a release of hazardous waste into the environment at the Texas Smelter.

**C. ASARCO-MONTANA**

65. From at least May 1991 to the present, ASARCO has been an owner and operator, as defined at 40 C.F.R. 260.10 and Mont. Admin. R. 17.54.201, of the Montana Smelter, a facility where ASARCO received, stored, treated and disposed of hazardous waste as defined in 40 C.F.R. § 261.3 and Mont. Admin. R. 17.54.303.

66. Because ASARCO is and has been an owner and operator of a facility at which ASARCO received, stored, treated and disposed of hazardous waste, ASARCO is and was subject to the RCRA hazardous waste program and the Montana authorized hazardous waste program, codified at Mont. Code Ann. § 75-10-401 et. seq.

67. From at least May 1991 to present, ASARCO has received, stored, treated and disposed of Encycle Wastes. Some of the Encycle Wastes were and are hazardous waste under Mont. Admin. R. 17.54.303.

68. There has been a release of hazardous waste into the environment at the Montana Smelter.

#### D. ASARCO-TENNESSEE

69. At all times relevant hereto, ASARCO owned and operated the following six mines and mills in eastern Tennessee: Coy Mine, Young Mine, Young Mill, New Market Mine and Mill and Young Mine - Beaver Creek Shaft all located in Jefferson County, Tennessee; and Immel Mine located in Knox County, Tennessee.

70. On February 28, 1991, TNDEC issued NPDES Permit No. TN0001732, effective February 28, 1991, to February 27, 1996, which continues in effect until the permit is reissued, authorizing ASARCO's Coy Mine to discharge mine drainage to Mossy Creek.

71. On February 28, 1991, TNDEC issued NPDES Permit No. TN0001741, effective February 28, 1991, to February 27, 1996, modified on July 19, 1991, which continues in effect until the permit is reissued, authorizing ASARCO's Young Mine to discharge mine drainage to Beaver Creek.

72. On February 28, 1991, TNDEC issued NPDES Permit No. TN0027677, effective

February 28, 1991, to February 27, 1996, which continues in effect until the permit is reissued, authorizing ASARCO's Young Mill to discharge mill process water and storm water runoff to Beaver Creek.

73. On February 28, 1991, TNDEC issued NPDES Permit No. TN0057029), effective February 28, 1991, and expired February 27, 1996, which continues in effect until the permit is reissued, authorizing ASARCO's New Market Mine and Mill (NPDES Permit No. TN0057029) to discharge mine water to Dry Land Creek (Ault Lake) which flows into Beaver Creek.

74. On September 29, 1986, TNDEC issued NPDES Permit No. TN0061468, effective September 30, 1986, to September 29, 1991, which continued in effect until the permit was reissued and became effective on January 12, 1996, authorizing ASARCO's Young Mine - Beaver Creek Shaft to discharge treated wastewater and stormwater to Hodges Lake.

75. On February 28, 1991, TNDEC issued NPDES Permit No. TN0001759, effective February 28, 1991, and expired on February 27, 1996, which continued in effect until the permit was reissued on October 31, 1996, authorizing ASARCO's Immel Mine to discharge mine drainage to the Holston River.

76. At all relevant times Defendant "discharged pollutants" through "point sources" into "navigable waters of the United States" within the meaning of Sections 502(12), (14) and (7), 33 U.S.C. §§ 1362(12), (14) and (7), respectively.

## CLAIMS FOR RELIEF

### A. ENCYCLE

#### FIRST CLAIM FOR RELIEF

(Failure to Follow Waste Analysis Process)

77. Plaintiffs reallege paragraphs 1 through 76, inclusive, which are incorporated herein by reference.

78. Permit Section IX.B requires that every waste stream received by the Facility be sampled and analyzed before it is accepted for resource recovery, recycling or volume reduction. In order to be in compliance with this section, the facility must: (1) follow the pre-acceptance control procedures set forth in Section IX.B.1; (2) repeat the procedures in Section IX.B.1 as required by Section IX.B.2; (3) inspect each shipment of waste upon arrival and sample and analyze the waste in accordance with the Waste Analysis Plan as required by Section IX.B.3; and (4) keep records of the data collected during the waste analysis in the operating record of the facility in accordance with Section IX.B.4.

79. Encycle failed to follow the approved sampling and analysis procedures as required by Section IX.B.1 of its permit.

80. Encycle failed to follow the approved Waste Analysis Plan as required by Section IX.B.3 of its permit.

81. Encycle failed to keep and provide adequate records as required by Section IX.B.4 of its permit.

82. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500



per day of each violation which occurred after January 30, 1997.

## **SECOND CLAIM FOR RELIEF**

### **(Failure to Comply With Waste Acceptance Requirements)**

83. Plaintiffs reallege paragraphs 1 through 82, inclusive, which are incorporated herein by reference.

84. Permit Section IX.C provides that the waste material shall not be accepted at the Facility if a representative sample of the waste exhibits certain properties.

85. Permit Section IX.C further provides that non-hazardous waste will only be accepted for resource recovery, recycling or volume reduction if it contains a volatile organic carbon concentration less than or equal to 1000 parts per million (ppm) by volume of the total waste stream.

86. Encycle has accepted wastes exhibiting certain properties prohibited by Permit Section IX.C.

87. Encycle has accepted waste that contained a volatile organic carbon concentration greater than 1,000 ppm in violation of Permit Section IX.C.3.

88. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

## **THIRD CLAIM FOR RELIEF**

### **(Management of Hazardous Waste in Unpermitted Areas)**

89. Plaintiffs reallege paragraphs 1 through 88, inclusive which are incorporated herein by reference.

90. Section 3005 of RCRA, 42 U.S.C. § 6925, and 30 Tex. Admin. Code § 335.2 prohibit the operation of a hazardous waste storage facility without a permit granted in accordance with 40 C.F.R. § 270.

91. 40 C.F.R. § 262.34(a) and 30 Tex. Admin. Code § 335.69 provide that neither a permit nor interim status are required for hazardous waste storage if the generated hazardous waste remains at the facility for ninety (90) days or less.

92. Under such circumstances, however, the waste must be placed in containers that are marked "Hazardous Waste" or in a way that otherwise identifies the contents, as required by 40 C.F.R. § 262.34(c).

93. Encycle stores, treats and combines, listed and characteristic hazardous waste in areas of the Facility that are not properly permitted in accordance with 40 C.F.R. § 270.1.

94. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### FOURTH CLAIM FOR RELIEF

##### (Failure to Maintain Hazardous Waste Container In Good Condition)

95. Plaintiffs reallege paragraphs 1 through 94, inclusive, which are incorporated herein by reference.

96. 40 C.F.R. § 265.171 and 30 Tex. Admin. Code § 335.112 provide that if hazardous waste is being held in a container that is in bad condition (e.g., severe rusting or apparent structural defects) or leaking, the facility's owner or operator must transfer the waste or otherwise manage it in a way that complies with regulations.

97. Encycle held hazardous wastes in drums that had bulging lids.

98. Encycle kept hazardous wastes in structurally defective drums for extended periods, without otherwise managing it.

99. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### FIFTH CLAIM FOR RELIEF

(Failure to Amend the Contingency Plan)

100. Plaintiffs reallege paragraphs 1 through 99, inclusive, which are incorporated herein by reference.

101. Permit Section VIII.A and 40 C.F.R. 264.54(c) require that the Facility's contingency plan be reviewed, and immediately amended, whenever the facility changes its design in a way that alters the response necessary in an emergency. Facility No. 4 at the Facility is used for the management of hazardous waste.

102. Encycle's contingency plan contained a map that failed to indicate the presence of, or evacuation routes in and around, Facility No. 4.

103. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### SIXTH CLAIM FOR RELIEF

(Failure to List Items to be Inspected)

104. Plaintiffs reallege paragraphs 1 through 103, inclusive, which are incorporated herein

by reference.

105. Permit Section III.B.7 requires that the Facility's inspection forms specifically list every item that is to be inspected at each unit and component.

106. Encycle failed to list all necessary items on its permitted hazardous waste tank inspection form in Facility 3.

107. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### SEVENTH CLAIM FOR RELIEF

(Failure to Maintain the Necessary Personnel Training Documents)

108. Plaintiffs reallege paragraphs 1 through 107, inclusive, which are incorporated herein by reference.

109. Permit Section III.B.8 and 40 C.F.R. § 264.16(d) provide that a facility owner or operator must maintain records that detail, in writing, the "type and amount of both introductory and continuing training that will be given to each person filling a position" related to hazardous waste management.

110. Encycle does not have any written documents testifying to the amount of training, introductory or otherwise, given to hazardous waste management personnel.

111. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

## EIGHTH CLAIM FOR RELIEF

### (Failure to Post Signs)

112. Plaintiffs reallege paragraphs 1 through 111, inclusive, which are incorporated herein by reference.

113. Permit Section III.B.10 and 40 C.F.R. § 264.14(c) require that the facility's owner or operator post a sign at every main facility entrance that reads, "Danger-Unauthorized Personnel Keep Out." These signs must be legible from a distance of twenty-five feet and written in English and Spanish.

114. At the entrance to Building B, a receiving building and container storage area, Encycle failed to post any visible signs at all.

115. At the entrances to Facility No. 3, a hazardous waste tank and container storage area, Facility No. 1, a container storage area, and Building C, a container storage area, Encycle posted signs in English, but failed to post signs in Spanish.

116. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

## NINTH CLAIM FOR RELIEF

### (Failure to Transfer Waste in Areas with Secondary Containment)

117. Plaintiffs reallege paragraphs 1 through 116, inclusive, which are incorporated herein by reference.

118. Permit Section III.B.13 requires that all waste transfers from off-site transport trucks or railcars take place in areas of the facility that provide for secondary containment.

119. Encycle unloaded trucks containing waste from off-site sources near the north entrance of Building B, a receiving building.

120. Sections of the area use for unloading lacked the required secondary containment.

121. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### TENTH CLAIM FOR RELIEF

(Failure to Notify the Regional Administrator of Wastes From Foreign Sources)

122. Plaintiffs reallege paragraphs 1 through 121, inclusive, which are incorporated herein by reference.

123. 40 C.F.R. § 264.12(a) and 30 Tex. Admin. Code § 335.12 require that the owner or operator of a facility notify the Regional Administrator, in writing, at least four (4) weeks in advance of the date on which waste from a foreign source is expected to arrive at the facility.

124. On a number of occasions from at least December 17, 1993 until at least September 12, 1995, Encycle received shipments of hazardous wastes from foreign sources.

125. Encycle may have received shipments of wastes from foreign sources on other occasions.

126. Encycle never gave the Regional Administrator notice of the receipt of any of the above listed foreign waste shipments.

127. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

### ELEVENTH CLAIM FOR RELIEF

#### (Failure to Install a Monitoring System)

128. Plaintiffs reallege paragraphs 1 through 127, inclusive, which are incorporated herein by reference.

129. Permit Section IX.E.3 requires that a monitoring system be installed in the Facility to continuously measure and record the ambient air concentrations of hydrogen cyanide and hydrogen sulfide therein.

130. Encycle has failed to install such a monitoring system.

131. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

### TWELFTH CLAIM FOR RELIEF

#### (Treating Hazardous Wastes Without a Permit or Interim Status)

132. Plaintiffs reallege paragraphs 1 through 131, inclusive, which are incorporated herein by reference.

133. Sections 3005(a) and (e) of RCRA, 42 U.S.C. §6925(a) and (e), and 40 C.F.R. § 270.1 require that the owner or operator of a facility obtain a permit, or interim status, before treating hazardous waste.

134. Encycle is, and has been, treating various hazardous wastes at the Facility. The wastes are treated and stored, and then transported to the ASARCO Smelters and other facilities for further management.

135. Encycle has a hazardous waste storage permit but is not not permitted for, or

otherwise authorized to conduct, any other hazardous waste management activity at the Facility.

136. Encycle has not received a permit or obtained interim status for any treatment activity at the Facility.

137. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

### THIRTEENTH CLAIM FOR RELIEF

#### (Failure to Comply With Hazardous Waste Exporting Requirements)

138. Plaintiffs reallege paragraphs 1 through 137, inclusive, which are incorporated herein by reference.

139. C.F.R. § 262.53 and 30 Tex. Admin. Code § 335.76(b) require the primary exporter of hazardous waste to notify the EPA, sixty (60) days in advance, of its intent to export waste out of the United States. This notification must be in writing and signed by the primary exporter.

140. 40 C.F.R. § 262.54 and 30 Tex. Admin. Code § 335.76(b) require the primary exporter to comply with the manifest requirements set forth in §§ 262.20-23 and §§ 335.10(a)-(d), respectively.

141. 40 C.F.R. § 262.56 requires the primary exporter to "file with the Administrator ... a[n annual] report summarizing the types, quantities, frequency, and ultimate destination of all hazardous waste exported during the previous calendar year."

142. 40 C.F.R. § 262.57 requires the primary exporter to keep a copy of the following for every export: (1) each notification of intent to export; (2) each EPA acknowledgment of consent; (3) each confirmation of delivery; and (4) each annual report.



143. Encycle exports hazardous waste to foreign countries but has failed to comply with all of the reporting and record keeping requirements cited above.

144. The foreign countries to which Encycle has exported hazardous wastes have included Canada, China and Peru, and may include other countries.

145. Encycle has not notified the EPA of its intent to export hazardous waste.

146. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### FOURTEENTH CLAIM FOR RELIEF

(Failure to Package, Label, Mark and Placard)

147. Plaintiffs reallege paragraphs 1 through 146, inclusive, which are incorporated herein by reference.

148. 40 C.F.R. § 262.30 and 30 Tex. Admin. Code § 335.65 provide that a generator must package hazardous waste in accordance with Department of Transportation ("DOT") packaging regulations before transporting the waste, or offering the waste for transportation off-site.

149. 40 C.F.R. § 262.31 and 30 Tex. Admin. Code § 335.66 provide that a generator must label hazardous waste in accordance with DOT hazardous waste regulations before transporting the waste, or offering the waste for transportation off-site.

150. 40 C.F.R. § 262.32 and 30 Tex. Admin. Code § 335.67 provide that a generator must mark hazardous waste in accordance with DOT hazardous waste regulations before transporting the waste, or offering the waste for transportation off-site. Further, each container of waste, of 100 gallons or less, used in such transportation must be marked by the generator with the

following words and information: HAZARDOUS WASTE-Federal Law Prohibits Improper Disposal. If found, contact the nearest police or public safety authority or the U.S. Environmental Protection Agency. Generator's Name and Address Manifest Document Number

151. 40 C.F.R. § 262.33 and 30 Tex. Admin. Code § 335.68 provide that a generator of hazardous waste "must placard or offer the initial transporter the appropriate placards" before the waste may be transported, or offered for transportation off-site.

152. Encycle transports hazardous waste off-site to the ASARCO Smelters as well as to other facilities.

153. Encycle has failed to comply with any of the packaging, labeling, marking and placarding requirements.

154. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January, 30, 1997.

#### FIFTEENTH CLAIM FOR RELIEF

(Failure to Comply With Manifesting Requirements)

155. Plaintiffs reallege paragraphs 1 through 154, inclusive, which are incorporated herein by reference.

156. 40 C.F.R.262.20 provides that any "generator who transports, or offers for transportation, hazardous waste for offsite treatment, storage, or disposal must prepare a manifest."

157. Encycle has listed and characteristic hazardous waste shipped throughout the United States without proper record, documentation, tracking or identification.

158. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### SIXTEENTH CLAIM FOR RELIEF

##### (Failure to Report and Keep Records)

159. Plaintiffs reallege paragraphs 1 through 158, inclusive, which are incorporated herein by reference.

160. 40 C.F.R. § 265.73 and 30 Tex. Admin. Code § 335.112 require the facility owner or operator to keep and maintain a record, as it becomes available, of facility operations, including information required by 40 C.F.R. § 265.73(b).

161. 40 C.F.R. § 265.74 and Tex. Admin. Code § 335.112 require that all records "be furnished upon request, and made available at all reasonable times for inspection, by any officer, employee, or representative of the EPA."

162. 40 C.F.R. § 265.75 requires the facility owner or operator to prepare and submit to the EPA a biennial report covering the facility's activities during the previous calendar year. For off-site facilities, the biennial report must include the EPA identification number of each generator from which the facility received hazardous waste during the year.

163. 40 C.F.R. § 265.76 provides that if a facility accepts hazardous waste for treatment, storage or disposal from an offsite source, without an accompanying manifest or shipping paper, the facility owner or operator must, within fifteen (15) days, prepare and submit a report to the Regional Administrator.

164. Encycle failed to comply with any of the report and record-keeping requirements

described above for hazardous waste that entered the site.

165. In some instances when reports and records were made Encycle failed to maintain said records until final disposition of the hazardous waste.

166. Encycle failed to submit a biennial report to the Regional Administrator reporting on the final disposition of hazardous waste managed at the Facility.

167. Encycle failed to submit biennial reports for the hazardous waste streams generated from off-site hazardous waste.

168. Encycle failed to submit an unmanifested waste report for waste which it claims was exempt under RCRA.

169. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### SEVENTEENTH CLAIM FOR RELIEF

##### (Failure to Conduct Waste Analysis and Record Keeping)

170. Plaintiffs reallege paragraphs 1 through 169, inclusive which are incorporated herein by reference.

171. 40 C.F.R. § 268.7(a) and 30 Tex. Admin. Code §§ 335.509-510 require a generator of hazardous waste to test the waste and determine if it is restricted from land disposal. If, after testing, the generator determines that the waste can be land disposed without further treatment, the generator must submit notice and certification to the TSD facility, stating that the waste meets the applicable treatment standards. The notice must include, among other things, the manifest number associated with the shipment of waste.

172. Encycle failed to test hazardous waste it generated and shipped off-site to determine if it could be land disposed without further treatment.

173. Encycle failed to include certifications for such wastes detailing whether the wastes met applicable treatment standards with every shipment of waste.

174. Encycle failed to include the manifest number for each shipment of waste on a number of occasions.

175. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### **EIGHTEENTH CLAIM OR RELIEF**

##### **(Failure to Comply With Tank System Requirements)**

176. Plaintiffs reallege paragraphs 1 through 175, inclusive, which are incorporated herein by reference.

177. 40 C.F.R. § 264.191 and 30 Tex. Admin. Code § 335.112 require that the owner or operator of a facility determine whether each of the facility's tank systems is leaking or unfit for use. The owner or operator must have his written assessment of the tank system reviewed and certified by an independent, qualified, registered professional engineer. The certified assessment must be retained on file at the facility.

178. 40 C.F.R. § 264.193 and 30 Tex. Admin. Code § 335.112 require that all new and existing tank systems have secondary containment in order to prevent the release of hazardous waste or hazardous constituents into the environment. These secondary containment systems must meet the specific requirements set forth in 40 C.F.R. § 264.193(b).

179. Encycle failed to have a written tank assessment certified so as to attest to the tank system's integrity as required by 40 C.F.R. § 264.191 and 30 Tex. Admin. Code § 335.112.

180. Encycle does not have an approved secondary containment system in place for its tank system as required by 40 C.F.R. § 264.193 and 30 Tex. Admin. Code § 335.112.

181. Encycle failed to obtain and keep on file at the facility any tank inspection reports as required by 40 C.F.R. § 264.195 and 30 Tex. Admin. Code § 335.112.

182. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### NINETEENTH CLAIM FOR RELIEF

##### (Failure to Comply With General Inspection Requirements)

183. Plaintiffs reallege paragraphs 1 through 182, inclusive, which are incorporated herein by reference.

184. 40 C.F.R. § 265.15 and 30 Tex. Admin. Code § 335.112 require that the owner or operator of a facility develop and maintain a written schedule for the inspection of the facility that must identify the types of problems that are to be looked at during inspections.

185. Encycle's written inspection schedule fails to identify problems to be looked for during inspections (e.g., malfunctions, deterioration, operator errors and discharges).

186. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

## TWENTIETH CLAIM FOR RELIEF

### (Failure to Comply With Closure Requirements)

187. Plaintiffs reallege paragraphs 1 through 186, inclusive, which are incorporated herein by reference.

188. 40 C.F.R. § 265.112 and 30 Tex. Admin. Code § 335.112 require the owner or operator of a hazardous waste management facility to have a written closure plan that identifies the steps necessary to partially or finally close the facility at any point during its active life. The closure plan must include, among other things, a description of how each management unit at the facility will be closed.

189. Encycle's closure report is incomplete and inadequate because it does not identify the steps necessary to completely or partially close the facility.

190. Encycle's closure report also fails to identify and describe all hazardous waste management units at the Facility and describe how they will be closed as required by 40 C.F.R. § 265.112(b) and 30 Tex. Admin. Code § 335.112.

191. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

## TWENTY-FIRST CLAIM FOR RELIEF

### (Failure to Comply With the Financial Assurance Requirements)

192. Plaintiffs reallege paragraphs 1 through 191, inclusive, which are incorporated herein by reference.

193. 40 C.F.R. § 265.142 and 30 Tex. Admin. Code § 335.112 require that the owner or

operator of a facility to have a detailed written estimate, in current dollars, of the cost of closing the facility at the point in the facility's active life when the closure would be most expensive.

194. 40 C.F.R. § 265.143 and 30 Tex. Admin. Code § 335.112 require that the owner or operator of the facility to establish financial assurance for closure of the facility in accordance with the written estimate discussed above.

195. Encycle has not provided adequate assurance that it can finance closure of the facility if closure becomes necessary.

196. Encycle is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

B. ASARCO-EL PASO, TEXAS

TWENTY-SECOND CLAIM FOR RELIEF

(Failure to Notify)

197. Plaintiffs reallege paragraphs 1 through 196, inclusive, which are incorporated herein by reference.

198. Section 3010(a) of RCRA, 42 U.S.C. 6930(a), requires that and person transporting a hazardous waste or owning or operating a facility for treatment, storage or disposal of a hazardous waste, file a notification with EPA and the authorized State stating the location and general description of such activity and the hazardous wastes handled by such person.

199. ASARCO stored and/or disposed of hazardous waste, including Encycle Wastes at the Texas Smelter.

200. ASARCO never provided notification to EPA or Texas for these activities as



required by Section 3010(a) of RCRA, 42 U.S.C. § 6930(a).

201. ASARCO is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

### TWENTY-THIRD CLAIM FOR RELIEF

(Treatment, Storage, Disposal Without a Permit)

202. Plaintiffs reallege paragraphs 1 through 201, inclusive, which are incorporated herein by reference.

203. Sections 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and 30 Tex. Admin. Code § 335.2 provide that a facility shall not treat, store, or dispose of hazardous waste without permit.

204. ASARCO has treated and/or stored, and/or disposed of hazardous waste, including Encycle Wastes, at the Texas Smelter.

205. ASARCO has not received a permit or obtained interim status for any treatment, storage, or disposal activity at the Texas Smelter.

206. ASARCO is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

## TWENTY-FOURTH CLAIM FOR RELIEF

### (Land Disposal Restriction Requirements)

207. Plaintiffs reallege paragraphs 1 through 206, inclusive, which are incorporated herein by reference.

208. Storage and "land disposal" of restricted hazardous waste is prohibited unless all applicable storage and treatment standards have been met pursuant to Section 3004(d) through (g) of RCRA, 42 U.S.C. § 6924(d) through (g), 40 C.F.R. §§ 268.50 and 268.40, and 30 Tex. Admin. Code § 335.431.

209. ASARCO violated the land disposal restrictions at the Texas Smelter by storing and disposing of restricted hazardous waste, including Encycle Wastes, without meeting storage and treatment standards as required by 40 C.F.R. §§ 268.50 and 268.40, and 30 Tex. Admin. Code § 335.431.

210. ASARCO is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

### C. ASARCO-AMARILLO, TEXAS

## TWENTY-FIFTH CLAIM FOR RELIEF

### (Failure to Notify)

211. Plaintiff EPA realleges paragraphs 1 through 210, inclusive, which are incorporated herein by reference.

212. From June 27, 1994 to October 22, 1996, ASARCO generated and

stored hazardous spent refractory brick at the Texas Refinery. The brick was sent to ASARCO Montana for precious metals recovery.

213. Facilities generating and storing hazardous waste destined for precious metal recovery are regulated under 40 C.F.R. 266.70. 40 C.F.R. 266.70(b)(1) subjects persons generating or storing hazardous wastes ultimately sent for precious metals recovery to Section 3010(a) of RCRA, 42 U.S.C. § 6930(a).

214. Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), requires that any person generating or transporting a hazardous waste or owning or operating a facility for treatment, storage or disposal of a hazardous waste, file a notification with EPA and the authorized State stating the location and general description of such activity and the hazardous wastes handled by such person.

215. ASARCO failed to provide notification to EPA or Texas for these activities at the Texas Refinery as required by Section 3010(a) of RCRA, 42 U.S.C. § 6930(a).

216. ASARCO is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### TWENTY-SIXTH CLAIM FOR RELIEF

##### (Precious Metals Recovery Regulations)

217. Plaintiff EPA realleges paragraphs 1 through 216, inclusive, which are incorporated herein by reference.

218. 40 C.F.R. § 266.70 and 30 Tex. Admin. Code § 335.241 require persons who generate, transport and store hazardous waste that is reclaimed for precious metals recovery to comply with certain record keeping, notice and management regulations.

219. The ASARCO-Texas Refinery failed to comply with the record keeping, notice and management regulations for precious metals recovery in violation of 40 C.F.R. § 266.70 and 30 Tex. Admin. Code § 335.241.

220. ASARCO is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

#### TWENTY-SEVENTH CLAIM FOR RELIEF

##### (Failure to Manifest)

221. Plaintiff EPA realleges paragraphs 1 through 220, inclusive, which are incorporated herein by reference.

222. 40 C.F.R. § 266.70(b)(1) and 30 Tex. Admin. Code § 335.241 require facilities that ship hazardous waste off-site for precious metal recovery to comply with the provisions of 40 C.F.R. § 262.20 and Tex. Admin. Code § 335.10 which requires a manifest for each shipment of waste.

223. From June 27, 1994 to October 22, 1996, ASARCO sent hazardous spent refractory brick from the Texas Refinery to ASARCO Montana for precious metals recovery; the shipments of waste were not manifested as required by 40 C.F.R. 262.20.

224. ASARCO is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation since the violations occurred prior to January 30, 1997.

D. ASARCO-MONTANA

TWENTY-EIGHTH CLAIM FOR RELIEF

(Failure to Notify)

225. Plaintiff EPA realleges paragraphs 1 through 224, inclusive, which are incorporated herein by reference.

226. Section 3010(a) of RCRA, 42 U.S.C. 6930(a), requires that any person generating or transporting a hazardous waste or operating a facility for treatment, storage, or disposal of a hazardous waste, file a notification with EPA and the authorized State stating the location and general description of such activity and the identified hazardous waste handled by such person.

227. ASARCO stored and/or disposed of hazardous waste including Encycle Wastes at the Montana Smelter and ASARCO never provided notification to EPA or Montana for these activities as required by Section 3010(a) of RCRA, 42 U.S.C. § 6930(a).

228. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997 and \$27,500 per day of each violation which occurred after January 30, 1997.

TWENTY-NINTH CLAIM FOR RELIEF

(Treatment, Storage, Disposal Without a Permit)

229. Plaintiff EPA realleges Paragraphs 1 through 228, inclusive, which are incorporated herein by reference.

230. Sections 3005(a) and (e) of RCRA, 42 U.S.C. § 6925(a) and (e), and Mont. Code Ann. § 75-10-406 provide that a facility shall not treat, store, or dispose of hazardous waste without a permit.

231. ASARCO has treated and/or stored, and/or disposed of hazardous waste, including Encycle Wastes at the Montana Smelter.

232. ASARCO has not received a permit or obtained interim status for any treatment, storage, or disposal activity at the Montana Smelter.

233. ASARCO is subject to injunctive relief, and is subject to civil penalties not to exceed \$25,000 per day of noncompliance for each such violation-which occurred prior to January 30, 1997 and \$27,500 per day for each such violation which occurred after January 30, 1997.

### THIRTIETH CLAIM FOR RELIEF

#### (Land Disposal Restriction Requirements)

234. Plaintiff EPA realleges paragraphs 1 through 233, inclusive, which are incorporated herein by reference.

235. Storage and "land disposal" of restricted hazardous waste is prohibited unless all applicable storage and treatment standards have been met pursuant to Section 3004(d) through (g) of RCRA, 42 U.S.C. § 6924(d) through (g), 40 C.F.R. §§ 268.50 and 268.40, and Mont. Admin. R. 17.54.150(1).

236. ASARCO violated the land disposal restrictions at the Montana Smelter by storing and disposing of restricted hazardous waste, including Encycle Wastes, without meeting storage and treatment standards as required by 40 C.F.R. §§ 268.50 and 268.40, and Mont. Admin. R. 17.54.150(1).

237. ASARCO is subject to injunctive relief and civil penalties not to exceed \$25,000 per day of noncompliance for each such violation which occurred prior to January 30, 1997, and \$27,500 per day of each violation which occurred after January 30, 1997.

## E. ASARCO-TENNESSEE

### THIRTY-FIRST CLAIM FOR RELIEF

#### (Effluent Limit Violations)

238. Plaintiff EPA realleges paragraphs 1 through 237, inclusive, which are incorporated herein by reference.

239. Part I.B. of each NPDES Permit issued to ASARCO for its Coy Mine, Young Mine, Young Mill, New Market Mine and Mill, Young Mine - Beaver Creek Shaft, and Immel Mine, establishes effluent limitations for, inter alia, total suspended solids ("TSS"), zinc, cadmium, and flow.

240. On numerous relevant occasions since at least 1993, ASARCO discharged pollutants into navigable waters through point sources at Coy Mine, Young Mine, Young Mill, New Market Mine and Mill, Young Mine - Beaver Creek Shaft, and Immel Mine in excess of the effluent limitations established in each applicable NPDES Permit.

241. Each of ASARCO's effluent limitation exceedances violated Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342, and pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), subjects ASARCO to the imposition of injunctive relief and civil penalties not to exceed \$25,000 per day for each violation, and pursuant to Public Law 104-134, violations occurring on or after January 30, 1997, are subject to penalties not to exceed \$27,500 per day for each violation.

### THIRTY-SECOND CLAIM FOR RELIEF

#### (Unpermitted Discharge Violations)

242. Plaintiff EPA realleges paragraphs 1 through 242, inclusive, which are incorporated

herein by reference.

243. On numerous relevant occasions since 1993, ASARCO discharged process wastewater from unpermitted point sources at Young Mill and New Market Mine and Mill into navigable waters, in violation of Section 301 of the CWA, 33 U.S.C. §§ 1311.

244. ASARCO's unpermitted discharges from Young Mill and New Market Mine and Mill violated Section 301 of the CWA, 33 U.S.C. § 1311, and, pursuant to Section 309(b) and (d) of the CWA, 33 U.S.C. § 1319(b) and (d), subjects ASARCO to the imposition of injunctive relief and civil penalties not to exceed \$25,000 per day for each violation, and pursuant to the Public Law 104-134, violations occurring after January 30, 1997, are subject to penalties not to exceed \$27,500 per day for each violation.

### THIRTY-THIRD CLAIM FOR RELIEF

(Record Keeping, Sampling and Analytical Violations)

245. Plaintiff EPA realleges paragraphs 1 through 244, inclusive, which are incorporated herein by reference.

246. Part I, Section B.3. of each NPDES Permit issued to ASARCO for Coy Mine, Young Mine, Young Mill, New Market Mine and Mill, Young Mine - Beaver Creek Shaft, and Immel Mine specifies record keeping requirements including the analytical method and the requirement to record the time that analyses were performed.

247. Part I, Section B.2. of each NPDES Permit issued to ASARCO for Coy Mine, Young Mine, Young Mill, New Market Mine and Mill, Young Mine - Beaver Creek Shaft, and Immel Mine states that ASARCO must determine pollutant parameters in accordance with 40 C.F.R. Part 136, which requires that during sampling and analyses, ASARCO must measure pH



within 15 minutes of sample collection; preserve samples collected for the determination of total suspended solids ("TSS"), and for the determination of total cadmium, copper, lead, mercury and zinc.

248. On numerous occasions since at least 1992, ASARCO violated record keeping and sampling/analytical requirements each time a sample was taken or an analysis was conducted.

249. The acts or omissions referred to in the preceding paragraph constitute violations of the NPDES Permits and the CWA.

250. Pursuant to Section 309(b) of the CWA, 33 U.S.C. §1319(b), ASARCO is liable for civil penalties not to exceed \$25,000 per day for each of its violations of the CWA, and pursuant to Public Law 104-134, violations occurring after January 30, 1997, are subject to penalties not to exceed \$27,500 per day for each violation.

#### F. ENCYCLE STATE OF TEXAS CLAIMS

##### THIRTY-FORTH CLAIM FOR RELIEF

(Storage of Hazardous Waste in Unpermitted Surface Impoundments and Containers)

251. Plaintiff State realleges paragraphs 1 through 250, inclusive, which are incorporated herein by reference.

252. Pursuant to 30 Tex. Admin. Code § 335.2, "no person may cause, suffer, allow, or permit any activity of storage, processing, or disposal of any industrial solid waste or municipal hazardous waste unless such activity is authorized by a permit, amended permit, or other authorization from the Texas Natural Resource Conservation Commission . . . ."

253. During TNRCC's inspections of May 31 through June 13, 1994 of the Encycle Facility, TNRCC determined that Encycle stored listed hazardous waste sludges and waste water

in two surface impoundments (the "East and West Lagoons") that are permitted only for storing uncontaminated storm water. Additionally, Encycle stored hazardous waste from the reactor clarifier in unpermitted open containers, known as Baker Tanks, for more than 90 days.

254. During March 1994, Encycle experienced problems with its reactor clarifier. The sludge bed in the reactor clarifier became very thick and there was a concern that there would be carryover of solids into the NPDES outfall. Encycle did not have a permitted unit available to manage emergency discharges from the reactor clarifier. Therefore, hazardous waste waters and hazardous sludges from the reactor clarifier were routed to the East and West Lagoons. The remaining contents of the reactor clarifier later were pumped into open containers, leased temporarily by the facility, while the reactor clarifier was repaired.

255. Hazardous waste waters and sludges in the East and West Lagoons were pumped back into the treatment process. No closure report has been submitted for the East and West Lagoons. Solids in the containers were allowed to settle and the sludge from these tanks was shipped, either as generated or partially dried, to an off-site smelter.

256. During TNRCC's inspection of the Encycle Facility of October 25 through December 6, 1994, a review of the daily records indicated that Encycle routed listed and characteristically hazardous waste from the waste water treatment process to the East and West Lagoons on at least 24 occasions between July 30, 1990 and February 18, 1994. Encycle records also reflect that on July 31, 1991 and December 23, 1991, low pH water was being released to the West Lagoon. The records also show that on October 3, 1993, the pH for the waste water stored in West Lagoon was 1.3 standard units, making the waste stored in the West Lagoon a characteristic hazardous waste.

257. Pursuant to Tex. Health & Safety Code Ann. §§ 361.223 and 361.228, Encycle is subject to injunctive relief and to the imposition of civil penalties of not less than \$100 or more than \$25,000 for each act of violation and for each day of violation described above.

#### THIRTY-FIFTH CLAIM FOR RELIEF

##### (Failure to Document Daily Inspection Records)

258. Plaintiff State realleges paragraphs 1 through 257, inclusive, which are incorporated herein by reference.

259. Pursuant to 30 Tex. Admin. Code § 335.152(a)(8), an owner or operator must document an inspection of items specified in the regulations in the operating record of the facility.

260. During a TNRCC inspection of May 31 through June 13, 1994, TNRCC determined that Encycle, while conducting daily inspections of its waste management units, failed to document daily inspection information concerning Facility Unit No. 17, located inside the Facility #3 building.

261. Pursuant to Tex. Health & Safety Code Ann. §§ 361.223 and 361.228, Encycle is subject to injunctive relief and to the imposition of civil penalties of not less than \$100 or more than \$25,000 for each act of violation and for each day of violation described above.

#### THIRTY-SIXTH CLAIM FOR RELIEF

##### (Unpermitted Discharge of Industrial Solid Waste)

262. Plaintiff State realleges paragraphs 1 through 261, inclusive, which are incorporated herein by reference.

263. Pursuant to 30 Tex. Admin. Code §335.4, General Prohibitions, no person may cause, suffer, allow, or permit the collection, handling, storage, processing, or disposal of

industrial solid waste in such a manner so as to cause:

the discharge or imminent threat of discharge of such waste into or adjacent to waters in the state without obtaining specific authorization for such a discharge from the TNRCC;

the creation or maintenance of a nuisance; or

the endangerment of the public health and welfare.

264. During TNRCC's inspection of the Encycle Facility of October 25 through December 6, 1994, several discharges were observed. Documentation of additional releases of solid waste were noted during a review of the Neutralizer Plant (waste water treatment plant) daily log books for the period of July 1990 through May 1994. Encycle failed to take immediate remedial actions to abate the spills at the time of their occurrence. The spills and releases are summarized below:

During the inspection on November 7, 1994, a Demineralizer Storage Tank, hereinafter "Demin Tank", was overflowing onto the ground. The two Demin Tanks are used to store storm water from the plant-wide collection system and have also been used to store listed and characteristically hazardous waste water. Neutralizer Plant log documentation indicated that the Demin Tanks have overflowed on at least ten previous occasions;

On November 2, 1994, approximately 55,000 gallons of F006, copper bearing waste was spilled from Feed Tank #2. A "charge" (or load) of approximately 12,000 gallons of F006 had been placed into the tank. Encycle employees then turned on a city water line connected to the feed tank which caused the feed tank contents of F006 material to overflow. The F006 material filled the secondary containment and overflowed into the decontamination area. The F006 material then entered the storm drain system and flowed

into the West Lagoon. From the decontamination area the F006 material also flowed into the West Cell House which was below grade. During the inspection of October 26 through December 6, 1994, it was also documented that the building contained a large quantity of storm water. The volume of storm water contaminated with F006 was not included in the initial spill notification.

On October 4, 1994, Encycle notified the Region 14 Office that a portion of their underground storm water collection system had collapsed and that this might have affected the permitted container storage area located inside Building B. Encycle removed a portion of the floor in the building in order to repair the storm drain pipe. Encycle discovered that a large portion of the pipe outside the building also had to be replaced. While excavating the pipe, Encycle removed the soil and piled it on concrete adjacent to Building B and the excavation site. This waste pile did not have run-on or run-off protection and was not covered. Encycle then placed the soil into rolloffs and sampled each rolloff. Five of the fifteen rolloffs tested characteristically hazardous for Cadmium. The storage of this waste pile constitutes a threat of a release of hazardous constituents.

265. Pursuant to Tex. Health & Safety Code Ann. §§ 361.223 and 361.228, Encycle is subject to injunctive relief and to the imposition of civil penalties of not less than \$100 or more than \$25,000 for each act of violation and for each day of violation described above.

### **THIRTY-SEVENTH CLAIM FOR RELIEF**

(Failure to Notify of Process Change as Required by Permit)

266. Plaintiff State realleges paragraphs 1 through 265, inclusive, which are incorporated herein by reference.

267. Permit Provision IX.A.2 of Encycle's Permit, Notification of Process Change, provides, in part, that

all representations with regard to construction plans and operating procedures in the permit application are conditions upon which this permit is issued. The permittee shall not vary from such representation if the change will cause a change in the method of control of emissions, the character of the emissions, or will result in an increase in the discharge of any air contaminant, unless he first makes an application to the TWC (now TNRCC) to amend the permit and such amendment is approved pursuant to the requirements of TACB Regulation X (31 TEX. ADMIN. CODE Chapter 120) and 31 TEX. ADMIN. CODE Chapter 335, Subchapter L. The TACB Central Office in Austin shall be notified at the time of such application to the TWC.

268. During the inspection of October 25 through December 6, 1994, TNRCC noted that Encycle failed to notify the Texas Air Control Board ("TACB") (one of the predecessor agencies of the TNRCC) of modifications to its process for reclaiming metals from new non-waste material. On August 26, 1992, Encycle notified the Texas Water Commission (one of the predecessor agencies of the TNRCC) Industrial and Hazardous Waste Permits Section of its intention to process a non-waste material, East Helena Baghouse Dust ("EHBD") in Facility #3. However, Encycle did not specifically notify the TACB of these modifications to processes which are mentioned in the permit.

269. During the inspection of October 25 through December 6, 1994, TNRCC also determined that Encycle failed to notify TNRCC about the additional changes made to the process which makes separate zinc and cadmium products rather than the original zinc/cadmium filter cake.

270. Pursuant to Tex. Health & Safety Code Ann. §§ 361.223 and 361.228, Encycle is subject to injunctive relief and to the imposition of civil penalties of not less than \$100 or more than \$25,000 for each act of violation and for each day of violation described above.

## THIRTY-EIGHTH CLAIM FOR RELIEF

### (Failure to Sign and Return Manifests to Generators)

271. Plaintiff State realleges paragraphs 1 through 270, inclusive, which are incorporated herein by reference.

272. Pursuant to 30 Tex. Admin. Code § 335.12(b)(2) and (3), Shipping Requirements Applicable to Owners or Operators of Storage, Processing or Disposal Facilities / Use of the Manifest System, "[i]f a facility receives, from a rail or water (bulk shipment) transporter, hazardous waste or Class I waste which is accompanied by a shipping paper containing all the information required on the manifest, the owner or operator, or his agent must:

immediately give the rail or water (bulk shipments) transporter at least one copy of the manifest or shipping paper (if the manifest has not been received);

within 30 days after the delivery, send a copy of the signed and dated manifest to the generator; however if the manifest has not been received within 30 days after delivery, the owner or operator or his agent, must send a copy of the shipping paper signed dated to the generator;

On at least 15 occasions, Encycle failed to meet the requirements of this rule by accepting bulk shipments of hazardous waste without a proper hazardous waste manifest.

273. Whenever a shipment of hazardous waste is initiated from a facility, the owner or operator of that facility must comply with the requirements of 30 Tex. Admin. Code § 312. On at least two additional occasions, Encycle failed to properly manifest two rejected loads of hazardous waste.

274. Pursuant to Tex. Health & Safety Code Ann. §§ 361.223 and 361.228, Encycle is subject to injunctive relief and to the imposition of civil penalties of not less than \$100 or more than \$25,000 for each act of violation and for each day of violation described above.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, the United States of America and the State of Texas, respectfully pray that this Court will:

a. Assess civil penalties not to exceed Twenty-Five Thousand Dollars (\$25,000) for each day of each violation prior to January 30, 1997 and not to exceed Twenty-Seven Thousand, Five Hundred Dollars (\$27,500) for each day of each violation after January 30, 1997 of RCRA and the CWA alleged in this complaint by the United States.

b. Assess civil penalties not to exceed Twenty-Five Thousand Dollars (\$25,000) for each day of each violation for each day of each violation alleged in this complaint by the State of Texas.

c. Grant injunctive relief to the United States and the State of Texas to bring Encycle and ASARCO into compliance with RCRA, to require Encycle and ASARCO to conduct corrective action , and to bring Encycle and ASARCO into compliance with all applicable environmental laws.

d. Grant such other further relief as this Court may deem just and proper.

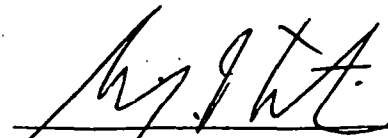
Dated this \_\_\_\_ day of \_\_\_\_\_, 1999.

Respectfully submitted,

 9/10/99  
LOIS J. SCHIFFER

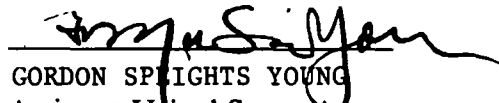
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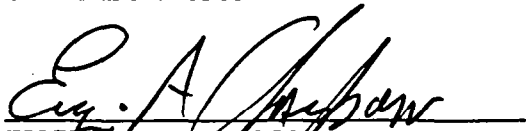
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